CENTURY DECORATORS SDN. BHD.

v.

CHONG CHU KHIM

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[CIVIL SUIT NO. F. 146 OF 1983]
11 NOVEMBER 1983

LAND LAW: *Tenancy agreement - Option to renew - New rent to be agreed upon by parties - Whether new rent tacitly agreed upon - Failure to agree - Validity of option clause.*

There were two applications. The first was by the plaintiff under O. 81, r. 1 of the Rules of the High Court, 1980 for specific performance of a term in a tenancy agreement providing for renewal of the tenancy. The other application was by the defendant for vacant possession of the premises occupied by the plaintiff and for damages. A renewal clause in the tenancy agreement provided for the renewal of the tenancy for a further term of 3 years at a rent to be agreed upon by the parties. The plaintiff contended that there was a tacit understanding between the plaintiff and the previous landlord that the new rental should be according to the prevailing market price.

Held:

[1] In the circumstances of the case, it was inherently improbable that any tacit understanding ever existed regarding the new rental.

[2] The option clause was unenforceable. An option to renew a lease for a further term, leaving the rent to be determined by agreement between the parties, is too vague and indefinite to be capable of enforcement in the absence of a supplementary agreement fixing the terms of the new lease and the rent to be paid.

[Plaintiff's application dismissed.]

Case referred to:
King's Motors (Oxford) Ltd. v. Lax & Anor. [1979] 3 All ER 665

Legislation referred to:
Rules of the High Court 1980, O. 81 r. 1

For the plaintiff - Abdul Ghani; M/s. Choong Yik Son
For the defendant - S. Periasamy; M/s. Nahappan, Peri & Partners

JUDGMENT

LC Vohrah J:

There were two applications in this matter. The first was an application by the plaintiff under O. 81 r. 1 of the Rules of the High Court 1980 for specific performance of a term in a tenancy agreement relating to the renewal of the plaintiff's tenancy (See Encl. 4) and the other an application by the defendant for vacant possession of the premises occupied by the plaintiff and for consequential damages (See Encl. 18).

The tenancy agreement was entered into between the plaintiff's "predecessor", Great Wall Furniture (M) Sdn. Bhd. trading under the name of Century Decorators, and the defendant's predecessor-in-title, Wong Fook Seng (See Exhibit A, Encl. 3). The question of the renewal of the tenancy was provided for by Clause 5(c)(i) whose provisions read:

> the Landlord will on the written request of the Tenant made three (3) months before the expiration of the term hereby created and if there shall not be at the time of such request any existing breach of non-observance of any of the agreements or covenants on the part of the Tenant to be performed or observed as hereinbefore contained at the expense of the Tenant grant to the Tenant's (sic) tenancy of the Demised Premises for a further term of three (3) years from the expiration of the term hereby created at a rent to be agreed but otherwise containing the like covenants and provisions as are herein contained with the exception of the present provision for renewal.

The original tenancy was for a fixed period of 3 years commencing on 1 March 1979 and ending on 31 April 1982. On 20 November 1981 the plaintiff's solicitors wrote to the defendant as agent of the landlord in purported exercise of the plaintiff's option under Clause 5(c)(i) as follows:

> We are instructed by our clients to exercise the Option under Clause 5(c)(i) of the Tenancy Agreement dated 28th April 1979 to renew the tenancy of the above premises for a further term of three (3) years commencing on the 1st day of May 1982 at a rent based on the prevailing market rate and subject to the same terms and conditions as contained in the Tenancy Agreement dated 28th April 1979.

The plaintiff contended that despite the provisions of Clause 5(c)(i) there was a "tacit understanding" between the plaintiff and the previous landlord that the rental for the new tenancy term would be "in accordance with the then prevailing market price." This understanding, as deposed by the plaintiff's female director Gan Giok Tin (See Encl. 3), was arrived at in the presence of the late Mr. Henri Chee who acted as solicitor for both the parties but she did not say if she herself was present or not at this meeting. She further deposed that upon enquiries made of tenants occupying neighbouring shop-lots she discovered a rental of RM5,000 to RM6,000 as the prevailing market rate and offered a rental in this range as reasonable rental for the fresh term but this was rejected by the defendant who demanded instead a rental of RM12,000 per month. To support her contention of the unreasonableness of the new rental demanded by the defendant, she furnished an open market valuation report (See Exhibit B, Encl. 6) which gave the market rental value of the plaintiff's premises in the context of the tenancy agreement at RM4,500 per month.

The defendant's brother and duly authorised agent Chong Wai Hiong on the other hand deposed (See Encl. 15) that he was the person actually involved in the negotiations leading to the tenancy agreement and that he was the person who had signed it on behalf of the defendants's predecessor-in-title Wong Fook Seng. Chong Wai Hong in no uncertain terms denied that there was any tacit understanding between the plaintiff and the previous beneficial owner i.e. the defendant's predecessor-in-title or that the plaintiff's afore-mentioned director Gan Giok Tin was ever involved in the negotiations relating to the tenancy agreement. This denial was not refuted by the plaintiff in an any way. The Court's attention was also drawn to the letter dated 23 February 1982 from the firm of solicitors Henri Chee & Kay (see Exhibit C, Encl. 3) stating that the defendant was prepared to renew the tenancy for another three years if the rental of RM12,000 per month was acceptable to the plaintiff; otherwise the tenancy should be treated as coming to an end on 30 April 1982. It was the contention of Counsel for the defendant that if the tacit understanding which was alleged to have been arrived at in the presence of the late Mr. Henri Chee had in fact taken place such a letter would not have been sent by Mr. Henri Chee's firm. I accepted this contention of Counsel for the defendant and found it inherently improbable in the face of the vague assertion on the part of Gan Giok Tin and the firm denial of Chong Wai Hong that any such tacit understanding ever existed.

I now have to consider the effect of the option in the tenancy agreement as provided for by Clause 5(c)(i). In the case of *King's Motors (Oxford) Ltd. v. Lax & Anor.* [1979] 3 All ER 665 where the Court was asked to decide upon the validity and effect of an option clause almost similar to that in the present case Burgess VC had this to say at p. 665:

> The agreement for uncertainty is that as the rent was not agreed and was left to be agreed; unless the parties were - if you like to put it that way - to play the game together and agree, the contract is not enforceable and is void for uncertainty. In substance it amounts to no more that a contract to enter into a contract which is always given as the classic example of an agreement which is unenforceable.
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> The cases on that sort of point are well known, and I need not refer to them. However, I have, through the industry of Counsel, had my attention drawn to *Young v. Van Beneen* [1953] 3 DLR 702 decided in the Court of Appeal in British Columbia, and Counsel for the defendants relies as part of his argument on the decision of the Court in that case. It is a case very similar to the present one. I just refer to the headnote which is in the following terms,
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> > Where a lease provides that the tenant has an option to rent the premises for a further period, fixing no term except the length of such period and leaving the rental to be determined by agreement between the parties, such provision is too vague and indefinite to be capable of enforcement and does not confer upon the tenant any right to a tenancy which is enforceable at law. In the absence of a supplementary agreement fixing the terms of the new lease and the rent to be paid, the tenant is bound to surrender possession at the expiration of the original lease.

In view of the foregoing and my finding that no tacit understanding was arrived at (and in view of the plaintiff's withdrawal of its earlier contention that the notice to quit was bad in law), I dismissed the plaintiff's application and allowed as a matter of course the defendant's application in respect of prayers (a), (b), (c) and (d) except that I allowed damages only in respect of mesne profits calculated at the normal rate of double the amount of the rental originally agreed upon.

Also found at [1984] 1 CLJ 245